(26)

IN THE

Supreme Court of the United States

October Term, 1943

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No.————

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J. L. BRANDEIS & SONS,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

—o—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

—o—o—

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Law Briefs—OMAHA LINO-SLUG CO.—418 So. 15th St.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, J. L. Brandeis & Sons, respectfully shows:

A. SUMMARY STATEMENT OF THE MATTER INVOLVED*

But one issue is presented to this Honorable Court[1] —that as to the application of the National Labor Relations (familiarly known as the Wagner) Act (49 Stat. 449, 29 U. S. C., Sec. 151, et seq.), hereafter referred to as the Act, to a local retail department store operation, as exemplified by the Petitioner's store in this case, and, consequently, to a local merchandising activity, heretofore generally conceived to be within that "host of local enterprises" authoritatively held to be outside of the purview of the Act.[2] The sole issue is, therefore, one of jurisdiction under that Act, namely, whether such an operation or activity—consisting of over-the-counter sales on the store premises—is in interstate commerce or affects interstate commerce, so that it may be said that a question "affecting commerce" within Sec. 10 of the Act has arisen.

It is the contention of the Petitioner, hereafter sometimes referred to as the Store, that the outposts of the National Labor Relations Board's jurisdiction have been passed or exceeded by the Board in a case involving such an essentially local operation or activity—the Petitioner

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*References to the Record, which is in four volumes, are by the letter R, followed by the volume number (1, 2, 2a or 3) and, then, the page or pages.

[1]A second, or subordinate, issue of the propriety of the Appropriate Unit, as found by the Board and confirmed by the lower Court, may be conceded not to be of influence on the grant of certiorari.

[2]**National Labor Relations Board v. Jones and Laughlin Steel Corporation**, 301 U. S. 1, loc. cit. 41, 81 L. Ed. 893, loc. cit. 914.

store corporation being representative of over 4,000[3] like department stores (having over $100,000 in annual sales volume)[4] throughout the country.

The proceeding arose before the National Labor Relations Board, hereafter referred to as the Board, by the usual Charge (R1-27) and Complaint (R1-29), to which the Petitioner urged the jurisdictional obstacle by Answer (R1-33). Following a Decision and Order of the Board (R1-67) adverse to the Petitioner on such jurisdictional issue, the Petitioner sought review in the Circuit Court of Appeals (R1-1), again challenging the Board's jurisdiction. That Court affirmed the Board (R3-4 and 12).

The test arises over the effort by the Respondent, in an original proceeding, to ascribe an Unfair Labor Practice to the Petitioner in refusing to bargain with a Certified Union in an Appropriate Unit of the Store, composed of only 26 (almost all women) out of 984 employees in only 2 Alteration (out of 117) Departments of the Store.

The subjects of inquiry are, therefore, (a) the character of the Petitioner's retail department store—preeminently an intrastate activity—as being in or substantially affecting interstate commerce vel non, and (b) the effect of a Labor Dispute in the foregoing limited Appropriate Unit, as threatening a burden or obstruction to

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[3]Bulletin for 1941 of the Harvard Bureau of Business Research shown in Stipulation of Parties (R1-41).

[4]Department Stores, in turn, are roughly 16% of all the retail stores in the country—63% being independent or community stores. **State Board of Tax Commissioners v. Jackson**, 283 U. S. 527, 533, 75 L. Ed. 1248, 1254. The tremendous impact of such foray into this retail area is, consequently, self-evident.

such interstate commerce, as alleged by the Board (R1-28 and 31).

As to the general character of the Store of the Petitioner, (a) above, a paraphrase of the lower Court's recital of the facts will suffice for the purpose of this Petition (R3-4). The Petitioner is a Nebraska corporation engaged in owning and operating a retail department store in the city of Omaha. The principal store occupies one-half block and has 10 floors and a basement, the basement and first 7 floors being devoted to merchandising and the 3 upper floors being used for service departments and an assembly hall. 2 drug stores in nearby buildings are also operated as departments of the Store. 5 floors of still another building are leased for warehousing and a garage, carpenter and paint shop are contained in another building, from which is supplied heat for the main Store. In the 117 Departments of the Store (99 owned and 18 leased) are exposed for sale to the public and sold over the counter on the Store premises the usual items of personal and household goods traditional to like department stores.

That the Store in this case does not differ essentially from similar institutions, such as the Corner Grocery Store or Corner Drug Store, cannot be gainsaid, because the criteria applied by the lower Court—criteria which metamorphose a manifestly local or intrastate activity into its strange antithesis—are of equal and pervasive application to such similar merchandising enterprises. It is for these reasons that the Petitioner here seeks certiorari, viz., because the case is representative of the entire field of retail operations, as commonly conducted, and because, it is submitted, the criteria as so applied by the Circuit Court of Appeals are fundamentally and authoritatively unsound.

These criteria (the burden of proof of the affirmative of which rested upon the Respondent Board) comprise—

(1) Whether purchases outside of the State, for the stocking of the shelves of the local merchant in the customary manner, give the otherwise local selling operations of the Store a national aspect, furnishing a jurisdictional base for application of the Act.[5]

It is submitted that this cannot be the test, as a like test would corral within the Act every retail store operation in the country—down to the most insignificant Corner Hardware Store or Grocery Store.

(2) Whether a negligible quantum of sales other than on the immediate Store premises—approximately 99% of the Store's business[6] being wholly intrastate—transforms an otherwise essentially local sales operation into an interstate operation.

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[5]The Petitioner purchased merchandise for resale for the year ending January, 1943, at a cost of $4,941,236, of which about 75% was purchased and shipped to it from outside of the State (R2-34, 38 and R1-40).

[6]Approximately 1.45% (or 66% of 2.2%) of the sales to the minimal out-of-state customers were sales actually transacted over the counter and there completed (Co.'s Exh. 7C, R2a-513, 514, and Co.'s Exh. 5C, R2a-512, and see R2-44 to 47, 50 to 53, 74, 252 and 260 to 263). Mail orders resulting from negligible telephone orders or on account of merchandise sent away as gifts to relatives, to customers on vacations or to children away in school (R2-46, 65) were only .0024% of all the retail sales (Co.'s Exh. 6C, R2a-513 and see R2-47 and 252 to 255). There are no deliveries by store facilities out of the State (R2-25, 40, 48 to 49 and 256 to 260), and delivery by out-of-state independent express facilities are only 3.7% of the total deliveries (or 8/10 of 1% of total sales), or around 29 a day compared to over 400,000 of all the Store's local deliveries in a year (Co.'s Exh. 6½C, R2a-513 and see R2-49 and 102). The advertising of the Store in newspapers, one with a small Iowa circulation (1/9 of the Omaha World-Herald's, R2-26) and the other in the Council Bluffs Nonpareil (representing only 1/60 of the Store's advertising budget—Co.'s Exh. 2C, R2a-511 and see R2-17 to 22, 26 and 250), only solicited local or intrastate sales (R2-103), as is further demonstrated by the negligible out-of-state sales.

It is submitted that such a small "interstate" volume is definitely in the "de minimis" category, but if applied as a test, would likewise embrace the operations of practically all retail stores within the Act.

(3) Whether considerations of the smallness of a store's operations, as opposed to the vastness of other stores, are immaterial[7] on the jurisdictional question.

It is submitted that a sweeping envelopment of all retail operations, both small and large, is unrealistic and completely erases the distinction of local, as against settled, interstate characters of operations.

(4) Whether the Act, therefore, applies to a retail store operation of ordinary proportions, not trenching upon the national field in some well-recognized respect, absent as to this Store and other like stores.

And that is the nub of this case.

As to the effect of a Labor Dispute, in the aforedelineated Appropriate Unit in a Store of the character here portrayed—in the aspect of threatening a burden or obstruction to interstate commerce, as alleged by the Board, as a prerequisite to a finding of an Unfair Labor Practice, (b) above—the record is likewise undisputed.[8] That the two alteration departments could close and the Store's operation not be affected at all, because of the non-essential character of the departments (R2-151 to

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[7]The Petitioner in this case is not a chain, mail-order house, or national emporium employing catalogs or federal trademarks or national advertising,—which set such institutions apart in the retail merchandise field, as being conducted on a nation-wide scale and having national aspects not in common with the Petitioner's Store in this case. Cf. **Liggett Company v. Lee**, 288 U. S. 517, 532, 77 L. ed. 929, 936.

[8]On all jurisdictional aspects, the evidence here, as elsewhere, was without conflict, as it proceeded only from Petitioner's witness.

152),[9] is apparent upon an appraisal of the effects on interstate commerce of a visualization of such Labor Dispute. It, therefore, leaves void a necessary prerequisite to the exercise of jurisdiction under the Act.

B. STATEMENT DISCLOSING THE BASIS UPON WHICH THIS COURT HAS JURISDICTION TO REVIEW THE DECREE OF THE CIRCUIT COURT OF APPEALS

(a) It is contended that this Honorable Court has jurisdiction to review the Decree of the Circuit Court of Appeals for the Eighth Circuit in this case under the provisions of Sec. 240(a) of the Judicial Code as amended (28 U. S. C., Sec. 347(a)); under Secs. 10(e) and (f) of the National Labor Relations Act, as amended (Act of July 5, 1935, Ch. 372, Sec. 10; 49 Stat. 453; 29 U. S. C., Sec. 160); and under General Rule 38, Sec. 5, Subd. (b), of this Court.

(b) The Statute of the United States involved in this proceeding is the Act of Congress known as the National Labor Relations Act (Act of July 5, 1935; 49 Stat. 449, Ch. 372; 29 U. S. C., Sec. 151, et seq.), the pertinent provisions of which are set forth in the Appendix to the Brief annexed hereto.

(c) The Decree of the Circuit Court of Appeals for the Eighth Circuit, now sought to be reviewed, was entered by the said Court on June 23, 1944 (R3-12). Such Decree was final in form and effect. The Petitioner thereafter filed a Motion to Stay the Issuance of a Certified Copy of the Decree (R3-14), upon which an Order was

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[9]The departments never were, in fact, closed and the finding is, therefore, wholly conjectural—not meeting, we submit, the burden of proof resting upon the Board. Reed on Law of Labor Relations, Sec. 1, p. 37.

entered staying the issuance thereof for a period of 30 days from July 18, 1944, if Certiorari was sought, and thereafter, until the final disposition of the case by the decision of the Supreme Court (R3-16).

C. QUESTIONS PRESENTED

The principal question presented is:

(1) Whether or not the Petitioner, in operating a local retail department store wholly within the confines of a State is, nevertheless, legally susceptible to the provisions of the National Labor Relations Act, as being in interstate commerce or substantially affecting interstate commerce, so as to come under the National Labor Relations Board's power to "prevent any person from engaging in any Unfair Labor Practice affecting commerce" as provided in Sec. 10 of such Act.

Ancillary to such main question are the further questions:

(2) From the standpoint of the incoming stock of merchandise and, foremost, because alone considered by the decision below to furnish a basis for a finding of a possible interruption or stoppage of interstate commerce—whether the wholly local character of such merchandising activity, represented by sales over the counter, is varied by the stocking of shelves of the Store through purchases outside of the State.

(3) From the standpoint of the outgoing sales by the Store—

(a) Whether occasional sales not over the counter on the Store premises (as by mail order)—in no event exceeding 1% of the Store's entire business—are sufficient to metamorphose a wholly intrastate activity into

an interstate activity, so as to render the Petitioner subject to the National Labor Relations Act.

(b) Whether trivial or minute percentages of such sales as, for instance, with respect to deliveries outside of the State by non-Store facilities (completing sales made upon the Store premises), are, nevertheless, to be considered as of sufficient influence to bring the Petitioner within the purview of the Act.

(c) Whether advertising in newspapers, with a minor circulation in other States—although soliciting only local or intrastate sales over the counter at the Store premises —renders the Petitioner subject to the Act.

(d) Whether sales on credit to out-of-state customers, in a very minor amount—made, however, on the Store premises—render the Petitioner subject to the Act.

(4) From the standpoint of the Respondent Board meeting the burden of proof cast upon it, that a Labor dispute in the Petitioner's Store, particularly in the two minor and non-essential alteration departments therein, would burden or obstruct interstate commerce or the free flow of interstate commerce, as alleged by the Board—whether the stoppage or suspension of such two alteration departments would have a direct and substantial effect on interstate commerce.

In deciding the foregoing questions adversely to the Petitioner, the Court below, it is submitted, committed error as to each and all of the afore-delineated questions. The Petitioner, therefore, designates such adverse rulings as specifications of error to be urged upon this Court.

D. REASONS RELIED ON FOR THE ALLOWANCE OF WRIT OF CERTIORARI

Without elaboration thereof herein,[10] the Petitioner submits the following as reasons which should impel the allowance of the Writ of Certiorari herein prayed.

I.

The Circuit Court of Appeals Has Rendered a Decision in Conflict With the Holdings of Other Circuit Courts of Appeals on the Same Matter

The decision below, in holding jurisdiction under the Act to attach to the Petitioner's Store in this instance, as a local merchant—even though part of the merchant's stock in trade originated outside of the State—is at odds with the holding by the Circuit Court of Appeals for the Second Circuit in—

> *Consolidated Edison Co. v. National Labor Relations Board* (C. C. A. 2), 95 Fed. (2) 390, 393; aff'd, 305 U. S. 197, 83 L. Ed. 126.

The decision below is, likewise, in conflict with a decision of the Circuit Court of Appeals for the Fourth Circuit in—

> *National Labor Relations Board v. White Swan Company* (C. C. A. 4), 118 Fed. (2d) 1002,

in holding that interstate purchases for the shelves of an otherwise purely local or intrastate business furnish a jurisdictional base for the application of the Act. See also *Schroepfer v. A. S. Abell* (C. C. A. 4), 138 Fed. (2d) 111.

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[10]See the Brief, annexed hereto, containing a more particular exposition.

II.

The Circuit Court of Appeals Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Honorable Court

This Honorable Court has heretofore settled, in several cases, the matter of jurisdiction under the National Labor Relations Act as to its application to manufacturing, canning, publishing, generating and other like industrial enterprises—all devoted to production. This case, however, presents, for the first time, another major phase of business activities not heretofore passed upon by this Court, namely, trading in merchandise, or retail selling—as encompassing, generally, local distribution.

This merchandising field of endeavor is so far a thing apart from production or manufacture, and so distinct a phase of national and local economy, that we submit that it warrants separate and decisive treatment. Even the Respondent Board itself, for eight years after passage of the National Labor Relations Act, did not invade this new field. The question of jurisdiction over merchants—particularly local retail merchants—should, therefore, be decided at the threshold, in order to settle the Law of Labor Relations in this vast segment of the Nation's business.

III.

The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Honorable Court

The decision below collides with the philosophy and trend of many prior decisions by this Court.

(a) Thus, on the one hand, it has ignored the initial observation by this Court that the National Labor Relations Act is not applicable to a "host of local enterprises throughout the country" where "there may be but indirect and remote effects upon interstate commerce."

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 30, 81 L. Ed. 893, 914.

That landmark case limited its decision of coverage under the Act to those enterprises "making their relation to interstate commerce the *dominant* factor in their activities."

(b) The decision below, likewise, has overlooked that the Act has been held not to extend to all employers and all employees.

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 30, 81 L. Ed. 893, 907, 908, 911.

Washington, Virginia & Maryland Coach Company v. National Labor Relations Board, 301 U. S. 142, 146, 81 L. Ed. 965, 969.

(c) The decision below has, likewise, failed to observe the caution, expressed by this Court, to preserve the distinction between what is national and what is local

in the activities of commerce, as vital to the maintenance of our Federal system.

National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U. S. 1, 30, 81 L. Ed. 893, 907, 908, 911.

New York ex rel. Pennsylvania Railroad Company v. Knight, 192 U. S. 21, 48 L. Ed. 325.

Parker v. Brown, 317 U. S. 341, 362, 87 L. Ed. 315, 332.

Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453, 460, 82 L. Ed. 954, 957.

Kirschbaum v. Walling, 316 U. S. 517, 86 L. Ed. 1638.

(d) The decision below has failed to note the requirement of this Court that the effect on Interstate Commerce of activities, which, separately considered, are local or intrastate, must be direct, immediate and substantial, as a prerequisite to jurisdiction under the Act.

Santa Cruz Fruit Packing Company v. National Labor Relations Board, 303 U. S. 453, 466, 82 L. Ed. 954, 960.

Anderson v. United States, 171 U. S. 604, 54 L. Ed. 300.

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 83 L. Ed. 1015.

U. S. v. Wrightwood Dairy Company, 315 U. S. 110, 86 L. Ed. 726.

35 Mich. Law Rev. 1286, 1294 on "Businesses Subject to the National Labor Relations Act."

(e) From another standpoint—the decision below has failed to recognize the traditional and time-honored

distinction, removing from Federal control "myriads of local businesses," as to matters "traditionally left to local custom or local law."

Federal Trade Commission v. Bunte Brothers, Inc., 312 U. S. 349, 355, 85 L. Ed. 881, 885.

(f) In still another respect, the decision below has failed to note observations, in recent wholesale cases, by this Court of the undeniably intrastate character of "goods acquired and held by a local merchant for local disposition."

Walling v. Jacksonville Paper Co., 317 U. S. 564, 570, 87 L. Ed. 460, 467.

McLeod v. Threlkeld, 319 U. S. 491, 494, 87 L. Ed. 1538, 1541.

Higgins v. Carr Brothers Company, 317 U. S. 572, 574, 87 L. Ed. 468, 471.

American Steel & Wire Company v. Speed, 192 U. S. 500, 48 L. Ed. 538.

(g) The decision below, also, has failed to follow the decisions of this Court, which mark the cessation of Interstate Commerce when goods have come to rest, subject to local distribution, after passage from another state.

Bowman v. Continental Company, 265 U. S. 642, 65 L. Ed. 1139.

Higgins v. Carr Brothers Company, 317 U. S. 572, 87 L. Ed. 468.

Best & Company v. Maxwell, 311 U. S. 454, 85 L. Ed. 275.

(h) The decision below, also, has failed to follow the decisions of this Court under Federal Acts, with a like jurisdictional standard or base, labeling local activ-

ities as having only an indirect or remote effect upon Interstate Commerce.

A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495, 79 L. Ed. 1570.

(i) On the other hand, the decision below particularly offends, in ascribing a jurisdictional base to the fact of purchases, originating in other States, for the stocking of the shelves of the local merchant, inasmuch as local selling by the merchant, and the consequent intrastate character of such business, are not altered by the importations of stock from other States, according to numerous decisions of this Court.

Hopkins v. United States, 171 U. S. 578, 43 L. Ed. 290.

A. L. A. Schechter Poultry Corporation v. United States, 295 U. S. 495, 79 L. Ed. 1570.

Walling v. Jacksonville Paper Company, 317 U. S. 564, 571, 87 L. Ed. 460, 468.

Consolidated Edison Company v. National Labor Relations Board, 305 U. S. 220, 83 L. Ed. 126, 135.

Rast v. Van Deman & Lewis Company, 240 U. S. 342, 60 L. Ed. 679.

Wagner v. Covington, 251 U. S. 95, 64 L. Ed. 157.

Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, 64 L. Ed. 649.

Southern Natural Gas Corporation v. Alabama, 301 U. S. 148, 81 L. Ed. 970.

Moore v. New York Cotton Exchange, 270 U. S. 604, 70 L. Ed. 754.

Rosenberg Brothers & Co. v. Curtis Brown Co., 260 U. S. 516, 67 L. Ed. 372.

(j) The decision below has failed properly to apply the "de minimis" doctrine, as prescribed by this Court in a case under the Act, to the approximately 1% of occasional or incidental sales delivered by mail or other non-Store facilities into other States.

National Labor Relations Board v. Fainblatt, 306 U. S. 601, 307 U. S. 609, 83 L. Ed. 1014.

(k) The decision below has over-ascribed importance to incidental advertising in newspapers, having circulation in two States (soliciting, however, only local sales), contrary to a decision of this Court.

Blumenstock Bros. Advertising Agency v. Curtis Publishing Co., 252 U. S. 436, 64 L. Ed. 649.

(l) The decision below has, likewise, not taken into consideration the holdings of this Court which judicially recognize the absence of a burden on Interstate Commerce of a Labor Dispute, to any appreciable extent, even though local business has been seriously disrupted thereby.

Industrial Association of San Francisco v. United States, 268 U. S. 64, 69 L. Ed. 849.

United Mine Workers v. Coronado Coal Company, 259 U. S. 344, 410, 66 L. Ed. 975.

United Leather Workers v. Herkert & Meisel Trunk Company, 265 U. S. 457, 68 L. Ed. 1104.

35 Mich. Law Rev. 1286, 1294, 1295, on "Businesses Subject to the National Labor Relations Act."

IV.

The Questions Presented Herein Are of Great Public Importance

Because the issue presented to this Honorable Court is of first impression therein, and because the settlement of such issue concerns the labor relations of the entire retail field in the country—numbering thousands of stores, as afore indicated—the questions presented hereby are of paramount importance to a very large segment of the business interests of the country.

Until the application of the Wagner Act to this field is authoritatively, and by a final decision, settled, unnecessary confusion will obtain. An economy of time and effort will result, and an abundance of harmony of viewpoint will prevail, if this Court accepts for review and final decision the questions posed by this case.

The need of an authoritative and elucidating decision by the business world, as well as by the legal profession, on a topic which affects "myriads of local businesses" as to matters heretofore "traditionally left to local custom or local law" (to borrow from *Federal Trade Commission v. Bunte Brothers, Inc.*, supra), does not require demonstration,[11] as transfer to Federal procedures of the Labor Relations of even some of the stores in the country is in itself imposing.

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[11] The Store of the Petitioner, from the standpoint of size, is itself far down the scale. See Census and Relative Position of Department Stores in Stipulation of Parties (R1-40 to 42).

E. RECORD TRANSMITTED HEREWITH

Your Petitioner presents to this Court, and files herewith, as an exhibit hereto, a duly certified transcript of the entire record in the case entitled *J. L. Brandeis & Sons, a Nebraska Corporation, Petitioner, v. National Labor Relations Board, Respondent,* and numbered on its docket No. 12,782, as the same appears in the United States Circuit Court of Appeals for the Eighth Circuit.

WHEREFORE, your Petitioner, referring to the annexed brief in support of the foregoing reasons for review, respectfully prays that this Honorable Court issue, under the seal of this Court, a Writ of Certiorari directed to the United States Circuit Court of Appeals for the Eighth Circuit (a certified full and complete Transcript of the Record of the proceedings in this cause being submitted herewith), to the end that the said cause may be reviewed and determined by this Honorable Court, as provided by law; that the judgment and decree of the Circuit Court of Appeals may be reversed; and that your Petitioner may have such other and further relief as to this Honorable Court may seem just.

Dated at Omaha, Nebraska, August 12, 1944.

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